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The Future of Environmental Regulation After Article 1110 of NAFTA: A Look at the Methanex and Metalclad Cases

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The Future of Environmental Regulation After Article 1110 of NAFTA:

A Look at the *Methanex* and *Metalclad* Cases

By *Marisa Yee*[*]

Introduction

The North American Free Trade Agreement (NAFTA) went into effect on January 1, 1994.[1] NAFTA is a trade agreement between the United States, Mexico and Canada. Its goals include eliminating trade barriers, resolving disputes, promoting fair competition, and increasing investment opportunities throughout the three countries.[2] Chapter 11 of NAFTA governs the treatment and protection of foreign investments made within the territory of NAFTA co-signers. Article 1110 of Chapter 11 is a key provision that prohibits host parties from expropriating (directly or indirectly) investments made by private investors within their territory.[3] Furthermore, Article 1110 provides that in the event of an expropriation occurring, compensation shall be provided to the injured party.[4]

Unfortunately, the term "expropriation" within Article 1110 remains unclear. This ambiguity leaves governments vulnerable to lawsuits by foreign companies that conduct business in the host country whenever the host country's actions reduce the companies' profits. This may jeopardize many national regulations, including efforts to protect the environment. Furthermore, Article 1110 gives foreign investors the right to sue host governments while offering no such protection to domestic investors. Thus, the foreign investors gain an unfair advantage over domestic companies.

According to a November 1999 report by the Ministry of Employment & Investment of

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1. Office of NAFTA and Inter-American Affairs (March 2002), *available at* http://www.mac.doc.gov/nafta/ovrview.htm (last visited Oct. 15, 2002).

2. *See generally* North American Free Trade Agreement, Dec. 8, 1993, Can.-Mex.-U.S., 107 Stat. 2057, 32 I.L.M. 289 [hereinafter NAFTA].

3. NAFTA, *supra* note 2, art. 1110.

4. *Id.*

British Columbia, "The most controversial part of NAFTA is the investor-state provision whereby a private investor can sue a state over an alleged breach of the agreement to obtain mandatory compensation, even if the action is for a public purpose such as protecting the environment."[5] This paper examines the future of environmental regulation after the implementation of Article 1110 of NAFTA. Specifically, this paper will explore the potential for passing future environmental regulation in host countries amid threats of potential lawsuits brought by private corporations claiming expropriation of their investments. In discussing this problem, this paper will analyze two recent cases, *Metalclad Corporation v. United Mexican States*[6] and *Methanex Corporation v. United States of America*.[7]

Part I of this paper will introduce NAFTA, specifically Article 1110 and the difficulties that have arisen in defining "expropriation." Part II of this paper will examine the background of the *Methanex* case, provide the pertinent facts, and discuss its current state of arbitration. Part III will give the background of the *Metalclad* arbitration, including the ultimate award that was decided by the Tribunal. Part IV will analyze the potential environmental effects that may result from the rulings in *Metalclad* and (potentially) *Methanex*. Part V will examine the potentially unfair advantage foreign corporations gain over domestic corporations through NAFTA's expropriation protections.

I. NAFTA – Introduction

The North American Free Trade Agreement (NAFTA) is a comprehensive trade agreement between Canada, the United States, and Mexico that was created to improve business transactions within North America. NAFTA eliminated all tariffs between the U.S. and Canada by 1998,[8] and will eliminate almost all of the tariffs between the U.S. and Mexico by 2008. The Agreement also removes other barriers that have excluded U.S. goods from the other two markets, especially Mexico. Since NAFTA's passage, the United States' economy has boomed and NAFTA has helped create fair and open markets within the NAFTA countries.[9]

NAFTA establishes concrete rules for settling disputes. Chapter 11 deals with investment disputes relating to obligations of NAFTA parties.[10] Under Chapter 11, NAFTA lists dispute resolution procedures to resolve complaints between the investor and the host country. Complaints brought under Chapter 11 are resolved by arbitration, based on the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) and the International Centre for the Settlement of Investment Disputes (ICSID).

A. NAFTA: Chapter 11

This article primarily discusses Part Five of NAFTA, Chapter 11: Investment Services and Related Matters.[11] However, the analysis will focus on Article 1110 and the potential for abuse by private investors.

5. Gerard Greenfield, *The Ties That Bind*: A *Brief Note on* NAFTA *Chapter* 11-*Type Rules in Canada's Bilateral Agreements*, *available at* http://www.wtoaction.org/greenfield4.phtml (last visited Oct. 15, 2002).

6. For a list of the NAFTA claim documents on *Metalclad Corporation v. United Mexican States*, visit http://www.naftaclaims.com (last visited Nov. 12, 2002).

7. For a list of the NAFTA claim documents on *Methanex Corporation v. United States of America*, visit http://www.naftaclaims.com (last visited Nov. 12, 2002).

8. Office of NAFTA and Inter-American Affairs, *supra* note 1.

9. United States Trade Representative/World Regions, NAFTA *Overview*, *available at* http://www.ustr.gov/regions/whemisphere/overview.shtml (last visited Apr. 13, 2003).

10. Department of Foreign Affairs and International Trade, *Dispute Settlement Under the* NAFTA, *available at* http://www.dfait-maeci.gc.ca/nafta-alena/settle-e.asp (last visited Oct. 15, 2002).

11. The relevant Articles of Chapter 11 for the purposes of this paper are: Articles 1101 (Scope and Coverage), Article 1102 (National Treatment), 1105 (Minimum Standard of Treatment), 1110 (Expropriation and Compensation), and 1116 (Claim by an Investor of a Party on its Own Behalf).

Chapter 11 of NAFTA is designed to protect investors from government expropriation by ensuring compensation.[12] Theoretically, Chapter 11 of NAFTA provides more security to foreign investors, which induces them to invest and stimulate economic growth; as a result, NAFTA countries are more likely to see expanded development.[13] Attracting investment is an important goal for Mexico, and many view the inclusion of Chapter 11 in NAFTA as crucial for expanding direct foreign investment in Mexico.[14] Canada and the United States also appreciated Chapter 11 because it protects their citizens who invest in Mexico.[15] Thus, at least in theory, Chapter 11 seemed to benefit all of the parties involved in the treaty.

This investor-state component of NAFTA differs from other dispute resolution systems because Chapter 11 allows individuals and corporations to sue national governments.[16] Corporations are permitted to sue governments in front of secret arbitration panels if they believe that a regulation or governmental decision by the host country has infringed on their investment in relation to the rules established by NAFTA.[17] If the corporation wins the lawsuit, then the taxpayers of the defendant country must pay damages.[18]

Claims brought by investors under Chapter 11 may vary, but assertions against national governments are limited. Claims must be filed within three years from the date the investor acquired knowledge of the alleged breach and with knowledge that the investor has incurred a damage or loss.[19] However, claims cannot be filed within six months of the occurrence of the events giving rise to the claim. Under Article 1121, the disputing investor must waive the right to initiate litigation under any other administrative tribunal as a condition for submission under Article 1116.[20]

Claims brought under Chapter 11 are litigated before the special international arbitration bodies of the United Nations and the World Bank.[21] The panel consists of three professional arbitrators, who have the authority to award unlimited damages to the plaintiffs if the panel rules that the defendant violated the investor's privileges and rights. These arbitration proceedings are negotiated behind closed doors and prohibit public participation or observation.[22]

B. NAFTA and The Free Trade Agenda.

The term "free trade agenda" describes the trend towards the removal of restrictions, barriers, and obstacles, to what should be "free trade" between nations.[23] Barriers include governmental regulation of corporate activities, such as laws that regulate the environment, employment, and public health. It also involves governmental regulation where private industry is excluded, such as in public sector services and utilities. According to some, these barriers reduce the potential for corporate profit.[24]

Over the last decade, the notion of "regulatory expropriation" has become an impor-

12. Daniel R. Loritz, Comment, *Corporate Predators Attack Environmental Regulations: It's Time to Arbitrate Claims Filed Under* NAFTA's *Chapter* 11, 22 Loy. L.A. Int'l & Comp. L. Rev. 533, 539 (2000).

13. Howard Mann, NAFTA *and the Environment: Lessons for the Future*, 13 Tul. Envtl. L.J. 387, 402 (2000).

14. *Id.*

15. *Id.*

16. Loritz, *supra* note 12, at 539.

17. Protecting Health, Safety and Democracy, National Non-Profit Public Interest Organization. NAFTA *Chapter* 11: *Corporate Cases, at* http://www.citizen.org/trade/nafta/CH_11/articles.cfm?ID=6475 (last visited Apr. 12, 2003).

18. *Id.*

19. Lucien J. Dhooge, *The Revenge of the Trail Smelter: Environmental Regulation as Expropriation Pursuant to the North American Free Trade Agreement*, 38 Am. Bus. L.J. 475, 489 (2001).

20. *Id.*

21. Protecting Health, Safety and Democracy, *supra*, note 17

22. *Id.*

23. The premise behind this agenda is to allow multinationals greater access to new markets free from any restrictions. For more information, visit http://pilger.carlton.com/globalisation/liberalisation (last visited Oct. 15, 2002).

24. WTOAction.Org: *The* NAFTA *Ruling on Metalclad v. Mexico*, Sept. 2000, *at* http://www.wtoaction.org/greenfield2.phtml (last visited Oct. 15, 2002).

tant part of the "free trade agenda."[25] The doctrine of "regulatory expropriation" evolved out of law professor Richard Epstein's theory of "regulatory takings,"[26] first articulated in Epstein's book, *Takings: Private Property and the Power of Eminent Domain* in the mid 1980s.[27] Epstein introduced a new constitutional interpretation that was designed to reign in modern government. Epstein argued that regulations that affect private parties' profits should be understood as "takings" under the Fifth Amendment and that governments must compensate businesses or individuals when their property value is diminished by public actions.[28]

C. Article 1110 of NAFTA.

Article 1110 (Expropriation and Compensation) states:

> 1. *No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:*
>   *a. For a public purpose;*
>   *b. On a non-discriminatory basis;*
>   *c. In accordance with due process of law and Article 1105(1); and*
>   *d. On payment of compensation in accordance with paragraphs 2 and 6.*[29]

Attempts to distinguish between "direct" and "indirect" expropriation have been difficult. Through an indirect expropriation, the property owner generally does not relinquish title to his or her property.[30] Therefore, an indirect expropriation describes a situation in which a foreign property owner has suffered a significant loss over the use of the enjoyment of his or her property but has not relinquished title to the land.[31]

"Expropriation" may be defined by exploring international law definitions, as well as traditional U.S., Canadian, and Mexican interpretations of the term. International law defines "expropriation" as "a compulsory transfer of property rights."[32] NAFTA's definition encompasses traditional U.S. and Canadian definitions.[33]

Canada follows the Expropriations Act, a remedial statute under which an expropriation occurs when a statutory authority acquires part of an owner's land without the owner's consent, and there is a reduction of market value to the remaining land.[34] The Act applies when land is expropriated or injuriously affected by a statutory authority.[35] The owner receives compensation based on the market value of the land, damages attributable to the disturbance, damages for injurious affection, and any special difficulties that may arise in relocation.[36]

The United States' definition of "expropriation" originates from bilateral investment treaties.[37] Bilateral investment treaties were developed to protect U.S. national investments in developing countries. Although the treaties do not clearly define "expropriation", the definition includes individual acts of expropriation and broader acts designed to restructure a particular industry or a whole economy.[38] This definition includes indirect takings through means of oppressive taxation and management restrictions.[39]

Traditional U.S. law defines "expropriation" as the taking of private property (gener-

25. William Grieder, *The Right and* U.S. *Trade Law: Invalidating the 20th Century*, THE NATION, Oct. 15, 2001, *available at* http://www.thenation.com (last visited Oct. 15, 2002).

26. *Id.*

27. *Id.*

28. *Id.*

29. NAFTA, *supra* note 2, art. 1110.

30. Jason L. Gudofsky, *Shedding Light on Article 1110 of the North American Free Trade Agreement* (NAFTA) *Concerning Expropriations: An Environmental Case Study*, 21 Nw. J. Int'l L. & Bus. 243, 257 (2000).

31. *Id.* at 258.

32. Loritz, *supra* note 12, at 540.

33. Dhooge, *supra* note 19, at 519.

34. Expropriations Act, R.S.O., ch. E26 (1990) (Can.), *available at* http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90e26_e.htm (last visited Nov. 12, 2002).

35. *Id.*

36. *Id.*

37. Dhooge, *supra* note 19, at 520.

38. *Id.*

39. *Id.*

ally land) by the government.[40] Under the U.S. Constitution, if the government passes a law which deprives the land owner of the use and enjoyment of his property, then the government must compensate that land owner for his loss.[41] For example, in *Lucas v. South Carolina Coastal Council*, the United States Supreme Court held that the state of South Carolina had to compensate a landowner who was barred from building homes on his private land due to the passage of South Carolina's Beachfront Management Act.[42]

Examining Mexican law also illuminates the definition of "expropriation." In the *Metalclad* decision, the Tribunal defined "expropriation" to include "incidental interference with the use of property," which is a more expansive view that awards compensation even if an investor is only partially deprived of the economic use of the property.[43] The Tribunal stated that an expropriation includes open takings of property, as well as incidental interference with the use of property, which deprives the owner, in whole or in significant part, of "the use or reasonably to be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[44]

NAFTA defines expropriation more broadly than U.S. or Mexican law.[45] There are three important aspects of the expanded definition:

1. In addition to land and physical assets, private property refers to the market- determined commercial value of property, including a corporation's asset value and future profit earnings.
2. Under the new definition, compensation is awarded when any part of commercial value is lost. Traditionally, compensation was awarded only when the entire value of property was lost.
3. In addition to "expropriation," acts "tantamount to expropriation" also require compensation. This includes a range of government policies, laws and administrative acts which may be viewed as having a similar effect as expropriation.[46]

This expanded definition of expropriation sets the stage for many of the cases brought under Chapter 11 of NAFTA, including the two to be examined in this note.

II. *Methanex Corporation v. United States of America*

Many criticize *Methanex Corporation v. United States of America* because of the potentially serious adverse effects on national environmental protection laws.[47] Critics claim that the arbitration procedures are undemocratic, particularly because they are carried out in secret, and that the public is denied its right to clean water and air without being given a say in the matter.[48] *Methanex* is currently in arbitration in Washington D.C.[49] Its outcome may have important environmental implications and will affect future litigation under Chapter 11 of NAFTA.

A. MTBE.

Methanol, commonly referred to as "wood alcohol," is the simplest alcohol.[50] Methanol is manufactured from fossil fuels such as coal and natural gas, as well as from

40. WTOAction.Org: *The* NAFTA *Ruling on Metalclad v. Mexico*, *supra* note 24.

41. U.S. CONST. amend.V.

42. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

43. Stephen L. Kass & Jean M. McCarroll, *The "Metalclad" Decision Under* NAFTA's *Chapter* 11, N.Y. L.J., Oct. 27, 2000, *available at* http://www.clm.com/pubs/pub-990359_1.html.

44. See Final Award, *Metalclad Corp. v. United Mexican States*, p. 33, Sept. 2, 2000, *available at* http://www.naftaclaims.com [hereinafter Final Award].

45. WTOAction.Org: *The* NAFTA *Ruling on Metalclad v. Mexico*, *supra* note 24.

46. *Id.*

47. Dhooge, *supra* note 19, at 478.

48. *Id.* at 479.

49. The Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of Arbitration, *available at* http://www.naftaclaims.com (last visited Oct. 15, 2002).

50. Methanol Basics- What is Methanol? Fact Sheet OMS-7, Aug. 1994, *available at* http://www.epa.gov/otaq/07-meoh.htm (last visited Apr. 3, 2003).

biomass (such as wood).[51] Methyl tertiary-butyl ether (MTBE) is a derivative of methanol and is used almost exclusively as a fuel additive in gasoline.[52] MTBE is used as a gasoline additive because it is a source of octane, which helps fuel resist uncontrollable combustion. MTBE is the most commonly used fuel oxygenate.[53]

MTBE has been used in U.S. gasoline since 1979.[54] In 1990, the United States passed amendments to the Clean Air Act that required increased oxygen content in gasoline for certain regions of the United States, including California.[55] Under the Amendments, oxygenates were required to be added to gasoline in order to reduce harmful emissions in automobile exhaust. Therefore, since 1992, MTBE has been used at higher concentrations in order to meet the requirements of the Clean Air Act Amendments.[56]

MTBE has been the preferred fuel oxygenate because of its low cost, ease of production, and favorable transfer and blending characteristics.[57] However, the chemical has a bitter, turpentine-like taste and odor, and even at very low concentrations can make drinking water unpotable.[58] MTBE is highly soluble in water, which indicates that it can quickly contaminate groundwater reservoirs.[59] It is also more difficult and expensive to clean up than other components and additives of gasoline.[60]

Some of the symptoms of prolonged exposure to MTBE include headaches, eye irritation, burning of the nose and throat, and nausea.[61] Laboratory studies have shown that prolonged exposure to significant amounts of MTBE in the air causes kidney damage and can harm the developing fetus of animals.[62] Studies also reveal that lifetime exposure to MTBE in air causes cancer in laboratory animals.[63]

Gasoline leaks present a significant threat to our environment, and because of the chemical properties of MTBE, the drinking water supplies of California are threatened. Both California and the federal government have implemented programs to minimize the occurrences of potential leaks and spills of gasoline. However, given the prevalence of gasoline and the limitations of fuel storage and transportation, fuel leakages are inevitable.

In the mid-1990s, some California residents began to notice a bitter taste and turpentine-like smell in their drinking water. This contamination appeared in 30 public water systems, including Santa Monica, Lake Tahoe, and Shasta Lake, as well as 3500 groundwater sites.[64] The source of the contamination was traced to MTBE used in gasoline, which was leaking from storage tanks into groundwater, thus rendering the water undrinkable.[65]

51. *Id.*

52. *Id.*

53. *Id.*

54. EPA: Methyl Tertiary Butyl Ether (MTBE), June 22, 2001, *available at* http://www.epa.gov/mtbe/gas.htm (last visited Oct. 15, 2002).

55. EPA: The Plain English Guide to the Clean Air Act, *available at* http://www.epa.gov/oar/oaqps/peg_caa/pegcaa02.html#topic2 (last visited Apr. 12, 2003).

56. *Id.*

57. Paul J. Squillace, James F. Pankow, Nic E. Korte & John S. Zogorski, *Environmental Behavior and Fate of Methyl Tert-Butyl Ether* (MTBE), U.S. Geological Survey Fact Sheet, FS-203-96, 1996, *available at* http://wwwsd.cr.usgs.gov/nawqa/pubs/factsheet/fs20398.pdf (last visited Oct. 15, 2002).

58. United States Environmental Protection Agency, Methyl Tertiary Butyl Ether (MTBE), Drinking Water, *available at* http://www.epa.gov/mtbe/water.htm#concerns (last visited Nov. 12, 2002).

59. *Id.*

60. *Id.*

61. *Assessment of Potential Health Risks of Gasoline Oxygenates with Methyl Tertiary Butyl Ether* (MTBE), *Office of Research and Development*, U.S. Envtl. Protection Agency, *available at* http://www.epa.gov/ncea/oxygenates/gas-mtbe.htm (last visited Oct. 15, 2002).

62. Office of Pollution and Prevention Toxics, U.S. Envtl. Protection Agency, *Chemicals in the Environment: Methyl Tert-Butyl Ether* (CAS No. 1634-04-4), Aug. 1994, *available at* http://www.epa.gov/opptintr/chemfact/f_mtbe.txt (last visited Oct. 15, 2002).

63. *Id.*

64. Grieder, *supra* note 25.

65. *Id.*

B. The UC Report on the Effects of MTBE

In November 1998, the University of California issued a report entitled Health and Environmental Assessment of MTBE: Report to the Governor and Legislature of the State of California as Sponsored by SB 521 (UC Report).[66] The multi-volume report on MTBE followed the passage of SB 521, which granted the University of California $500,000 to perform an extensive study on the human health effects and environmental impacts of using MTBE as an additive in gasoline.[67]

The UC Report concluded that there are significant costs and risks resulting from the MTBE contamination of surface water and groundwater. It stated that the cost to California for treatment of MTBE-contaminated drinking water could be enormous. The UC Report also found that MTBE is a carcinogen to animals and possibly to humans, and concluded that there is "no significant additional air quality benefit to the use of oxygenates such as MTBE in reformulated gasoline."[68] Recommendations were provided suggesting that California should phase-out MTBE over a several year interval instead of implementing an immediate ban on MTBE.

C. The Executive Order to Phase Out MTBE

On March 25, 1999, Governor Gray Davis issued Executive Order D-5-99, which called for a phase-out of MTBE in California gasoline by December 31, 2002.[69] The Order declared that "on balance, there is significant risk to the environment from using Methyl Tertiary-Butyl Ether (MTBE) in gasoline."[70] The determination of the Executive Order was based on the findings in the UC Report, as well as comments on the UC Report by the U.S. Geological Survey and the U.S. Agency for Toxic Substances and Disease Registry.

The Executive Order assigned eleven tasks to be carried out by various state agencies.[71] The California Air Resources Board was ordered to develop a timetable for the removal of MTBE from California gasoline by the earliest possible date.[72] The Order declared a complete phase-out of MTBE shall be in effect by no later than December 31, 2002.[73] In addition, state agencies were required to analyze the impact of ethanol on the environment in order to find a substitute gasoline additive for fuel.[74] Finally, the Executive Order did not require a direct ban of MTBE in gasoline but, instead, assigned tasks to state agencies towards regulating problems associated with MTBE contamination of drinking water supplies.[75]

D. Ethanol: A Potential Alternative to MTBE

After the issuance of the Executive Order, ethanol received new attention as a potential fuel additive. Ethanol (also known as ethyl alcohol or grain alcohol) is a clear, colorless liquid made primarily from grains or other renewable agricultural feedstocks, such as sugar cane and corn. Ethanol is being promoted because it is a renewable, biomass-based source of fuel and because its perceived environmental impacts are less than those associated with MTBE.[76] Proponents also claim that ethanol-blended gasoline will reduce dependence on imports of foreign oil and expand the market for ethanol-producing crops. Ethanol may also benefit the environ-

66. University of California, Office of the President, *News Media Advisory Subject*: UC *Delivers Report on* MTBE *to Governor Wilson, available at* http://www.ucop.edu/news/archives/1998/mtbe.html (last visited Oct. 15, 2002).

67. UC [University of California] MTBE Fact Sheet, Nov. 12, 1998, *available at* http://www.tsrtp.ucdavis.edu (last visited Oct. 15, 2002).

68. *Id.*

69. Cal. Envtl. Protection Agency, Eleven Tasks of the Executive Order, *available at* http://www.calepa.ca.gov/programs/mtbe/EOTasks.htm (last visited Oct. 15, 2002).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Statement of Defense of Respondent at 22, *Methanex Corp. v. United States of America, available at* http://www.methanex.com/investorcentre/MTBE.htm [hereinafter Statement of Defense].

76. Executive Summary, Dec. 1999, at 2 [hereinafter Exec. Summary].

ment by reducing carbon dioxide and carbon monoxide emissions, and by contributing to a net reduction in ozone-causing gases.[77]

Methanex contended that the Executive Order unfairly promoted ethanol as a fuel additive, which is primarily produced by the U.S.-based company Archer Daniels Midland (ADM).[78] ADM is a leading agricultural company headquartered in Decatur, Illinois, and produces ethanol from corn at various facilities throughout the Midwest.[79]

E. *Methanex*: Claims and Background

Methanex is a Canadian corporation involved in the production, transportation, and marketing of methanol. Methanex is headquartered in Vancouver, British Columbia, Canada, and is the largest marketer and producer of methanol in the world, with facilities in Canada, the United States, Chile, New Zealand, and Trinidad.[80] Its U.S. production facility (Methanex Fortier) closed in 1999.[81] As of 2000, Methanex owned world-wide production facilities with an annual capacity of approximately 7.0 million tons of methanol.[82] Approximately one-third of Methanex-produced methanol is used for MTBE.[83]

On June 15, 1999, Methanex Corporation notified the United States of its intention to seek damages under NAFTA in relation to the California decision to ban MTBE.[84] Methanex claimed that the California ban on MTBE substantially damaged Methanex, its U.S. investors, and its shareholders.[85] Methanex claimed that California's actions deprived, and would continue to deprive Methanex Corporation of a substantial portion of its customer base, goodwill, and the California market for methanol.[86] Methanex further contended that the California measures reduced the demand for methanol and that this decline would continue.[87] Methanol was a commodity with a substantially uniform global price, and Methanex asserted that the California phase-out of MTBE would continue to reduce the global methanol price.[88]

Because California significantly influences national environmental matters, Methanex claimed that the state's decision to ban MTBE is based on a flawed information and would create a "ripple effect" across the United States.[89] Therefore, Methanex argued that the anticipated restrictions on MTBE placed by other U.S. states constituted additional harm to Methanex, its investments, and shareholders.

Methanex further stated that the result of the Executive Order was an immediate drop in its market value on the Toronto Stock Exchange.[90] In just ten days, Methanex stock declined by approximately $180,000,000 (Canadian dollars). Methanex claimed that the loss was directly caused by California's actions.[91]

In the draft amended complaint, Methanex asserted that the Executive Order discriminated against MTBE in favor of the domestically produced ethanol.[92] The phase-out of MTBE acknowledged the underground

77. Canadian Renewable Fuels Association, Ethanol Fuels Are a Proven Technology, *available at* http://www.greenfuels.org/ethatech.html (last visited Oct. 15, 2002).

78. Claimant's Draft Amended Complaint at 4, *Methanex Corp. v. United States of America*, *available at* http://www.methanex.com/investorcentre/MTBE.htm [hereinafter Draft Amended Complaint] (last visited Apr. 12, 2003).

79. Larry Cunningham, Senior Vice President Corporate Affairs, ADM Company, ADM *Expands Ethanol Distribution Network to New York: New Terminal to Ease Transition to Clean-Burning, Renewable Ethanol*, ADM News, July 30, 2001, *available at* http://www.admworld.com/news/articles/pdf_releases/07_30_01_ethanol.pdf (last visited Oct. 15, 2002).

80. Draft Amended Complaint, *supra* note 78, at 3-4.

81. *Id.* at 5.

82. Draft Amended Complaint, *supra* note 78, at 32.

83. *Id.*

84. *News Release- Methanex Seeks Damages Under NAFTA for California* MTBE *Ban*, June 15, 1999, *available at* http://www.methanex.com/investorcentre/newsreleases/nafta.pdf (last visited Oct. 15, 2002).

85. *Id.*

86. *Id.*

87. Draft Amended Complaint, *supra* note 78, at 36.

88. *Id.*

89. *Id.*

90. Draft Amended Complaint, *supra* note 78, at 37.

91. *Id.*

92. *Id.* at 32.

storage tank (UST)[93] issue, but focused attention on one gasoline component, namely MTBE.[94] It thus treated a symptom (MTBE) of gasoline leakage, rather than the leakage itself, deflecting attention from California's failure to enforce its environmental law.[95] The amended complaint also alleged that Archer Daniels Midland, the main supplier of ethanol, improperly influenced and misled Governor Gray Davis.[96] Methanex claimed that the ban resulted because of lobbying by ADM and amounted to discrimination in favor of ethanol. Michael Macdonald, the Vice-President of Methanex's Planning and Strategic Development, stated, "[w]hat we are alleging is that under international law, which is what the NAFTA looks to, those sorts of actions are improper."[97]

Accordingly, Methanex's claims included: 1) approximately $1 billion damages suffered by Methanex Corporation, its investments, and its shareholders as a result of the U.S. breach of Articles 1102, 1105, and 1110 of NAFTA; 2) the costs of arbitration plus taxes; and 3) applicable interest.[98]

F. Methanex's Claims in Relation to NAFTA Article 1105

Article 1105 of NAFTA requires that "fair and equitable treatment" shall be accorded to all foreign investments.[99] This doctrine of fair and equitable treatment embodies four principles of international law: 1) a decision-maker acting independently and in the public interest must not be biased by pecuniary considerations; 2) state officials must act reasonably and in good faith; 3) the non-discrimination principle; and 4) an ostensibly legitimate measure taken by a State cannot be a disguised form of protection, but must be the least trade-restrictive of the reasonably remaining alternatives.[100]

Article 1105 requires States to act reasonably and in good faith.[101] Methanex claimed that Governor Davis' decision to ban MTBE was unfair and inequitable because he received misinformation and political contributions from ADM that misled him and affected his decision about the leakage of MTBE into drinking water supplies.[102] Methanex asserted that Governor Gray Davis lacked the independence and impartiality that neutral decision makers need under international law norms.[103]

Methanex also asserted that the ban on MTBE was unreasonable because there were better alternatives to solve the problem of leaking MTBE into drinking water.[104] In particular, Methanex claimed that Davis could have instead upgraded the existing gasoline tanks and fixed the leaks, as well as extended regulatory jurisdiction over all UST's in the state.[105] These measures could have eliminated up to 97% of UST leaks.[106]

Finally, Methanex claimed that Davis violated the duty to act independently and in good faith when he executed the Executive Order after accepting political contributions from a party that stood to benefit from the decision.[107] Methanex believed that California violated Article 1105 by acting unfairly, inequitably, and in a discriminatory manner in both intent and effect.[108]

93. The UST issue deals with underground storage tanks that store gasoline containing MTBE. The leakage of these tanks is a potential source of MTBE contamination. For more information, visit U.S. Environmental Protection Agency, MTBE (methyl tertiary-butyl ether) and Underground Storage Tanks, *available at* http://www.epa.gov/swerust1/mtbe/ (last visited Nov. 12, 2002).

94. Draft Amended Complaint, *supra* note 78, at 32.

95. *Id.* at 29.

96. *Id.* at 51.

97. Steve Mertl, *Methanex Alleges Dirty Politics Behind California Ban on Clean-Gas Additive*, THE CAN. PRESS, Mar. 8, 2001, *available at* 2001 WL 15636836.

98. Draft Amended Complaint, *supra* note 79, at 37-38.

99. *Id.* at 48.

100. *Id.* at 49.

101. *Id.* at 51.

102. *Id.*

103. *Id.*

104. *Id.* at 55.

105. *Id.* at 55-56.

106. *Id.* at 56.

107. *Id.*

108. *Id.* at 57.

G. Methanex Claims: NAFTA Article 1110

Methanex also claimed that the California measures to phase out MTBE violated Article 1110.[109] The United States "took a measure . . . tantamount to . . . expropriation of . . . an investment"[110] by preventing Methanex from maintaining its market share, and transferred that share to the domestic ethanol industry. Although some deference may be afforded to a state's exercise of its regulatory powers, discriminatory regulation may constitute an expropriation.[111]

Methanex argued expropriation under NAFTA included a wide range of governmental acts. Expropriation includes deliberate and open takings of property and incidental interference with the use of property, which partially or entirely deprives the owner of the use of "reasonably-to-be" expected economic benefit of property.[112]

Methanex asserted that market share, goodwill, and market access can all be illegally expropriated.[113] It cited *Pope and Talbot v. Canada*,[114] where the Tribunal held that the investor's access to the U.S. market is a property interest protected by Article 1110.[115] There, the NAFTA Tribunal issued its decision in favor of Pope and Talbot, concluding that the investor properly asserted that Canada had taken measures affecting its "investment," as defined in Article 1139 and Article 1110.[116]

Methanex also claimed that the measures taken by California were not intended to serve a "public purpose" as required by Article 1110.[117] Instead, Methanex asserted that the phase-out of MTBE was a mechanism for seizing the Methanex, Methanex U.S., and Methanex Fortiers' shares of the California oxygenate market and transferring it to the ethanol industry.[118] These measures were intended to protect the U.S. ethanol industry and were not imposed in a "non-discriminatory manner."[119]

Finally, Methanex claimed the measures taken by the California legislature failed to meet the Article 1110(c) requirement that they comply with "due process of law and Article 1105(1)" of NAFTA.[120] Methanex therefore seeks compensation for the harm imposed by measures tantamount to expropriation.

H. The United States' Defense Against Methanex

The United States denied all of Methanex's claims.[121] The U.S. contended that Chapter 11 of NAFTA did not hold a state responsible for damages to every business enterprise claiming a setback whenever a state took action to protect the public health or the environment. Dismissing Methanex's claims as absurd, the U.S. argued that if the NAFTA Tribunal adopted Methanex's construction of Article 1110, then no NAFTA Party could carry out its fundamental governmental functions unless it was prepared to pay for every economic impact that resulted.[122] The U.S. also challenged Methanex's claims on a jurisdictional and admissibility basis.[123]

Article 1101 of NAFTA limits claims to measures adopted or maintained by a Party relating to investors or investments of another Party.[124] The United States argued that neither the Senate Bill nor the Executive Order was a "measure . . . relating to" an investment of Methanex in the United States.[125]

109. *Id.* at 69.

110. *Id.* at 70.

111. 111 *Id.*

112. *Id.* at 69.

113. *Id.*

114. For more information on *Pope and Talbot v. Canada*, go to NAFTAlaw.org, *available at* http://www.naftaclaims.com (last visited Oct. 15, 2002).

115. Draft Amended Complaint, *supra* note 79, at 69.

116. *Id.*

117. *Id.* at 70.

118. *Id.*

119. *Id.*

120. Draft Amended Complaint, *supra* note 78, at 70.

121. Statement of Defense, *supra* note 75, at 1.

122. 122 *Id.* at 2.

123. *Id.*

124. NAFTA, *supra* note 2, art. 1101 (a)-(b).

125. Statement of Defense, *supra* note 75, at 28.

The U.S. interpreted Article 1101 to require a legally significant connection between the measure taken and the affected investment or investor.[126] According to the U.S., Methanex could not show this connection.[127]

The U.S. also argued that Article 1116 of NAFTA does not grant jurisdiction over claims for injuries suffered by an enterprise. Article 1116 permits a claim by an investor on its own behalf, but it does not permit claims by aggrieved shareholders, as Methanex tried to claim. In sum, the United States contended that Methanex cannot claim a loss independent of that allegedly suffered by the enterprises at issue.[128]

The United States also argued that Methanex's claim failed to identify an expropriated "investment" within the scope of Chapter 11.[129] Methanex did not claim that its U.S. holdings were nationalized or expropriated. Instead, it claimed that California's actions constituted a taking of Methanex U.S. & Fortier's *business*.[130] Moreover, the United States contended that Methanex failed to identify an interest within the definition of "investment" under Chapter 11.[131] Article 1139 defined "investment" for purposes of Chapter 11, but Methanex's definition of a "business" as an enterprise does not appear in Article 1139.[132]

The United States maintained that there has been no direct expropriation of Methanex's investments.[133] Methanex identified only two relevant U.S. subsidiaries, and alleged that the "business" of those subsidiaries has been expropriated.[134] However, the U.S. argued that neither Methanex U.S. nor Methanex Fortier was nationalized or confiscated and no expropriation had been proven.[135] The only claim that could create an inference of an expropriation is the Methanex subsidiaries' anticipated reduced sale of methanol.[136] According to the United States, market assurances for methanol did not constitute a property interest, and that no domestic or international laws assured a continued market for any given product.[137]

Finally, the United State argued that Methanex's claims for $970 million in damages lacked merit.[138] The long-term decline in Methanex's share price reflected the oversupply of methanol in the industry, and was not due to the measures complained of by Methanex.[139] In fact, the United States noted that the global price of methanol had actually increased substantially since the Executive Order announcement in March 1999.[140]

I. First Partial Award

On August 7, 2002, the Tribunal issued its first partial award.[141] At the time of the partial award, the Tribunal had not heard any testimony or other evidence, and the Award made no finding of fact.[142] The purpose of the Tribunal's decision on the Award was limited to the United States' challenges on jurisdiction and admissibility – nothing more.[143]

1. U.S. Challenges to Jurisdiction.

In general, the Tribunal rejected the U.S. jurisdictional challenges to Article 1102, 1105 and 1110.[144] The only challenge the Tribunal ruled in favor of was the one regarding Article 1101.[145]

126. *Id.*

127. *Id.* at 29.

128. *Id.* at 30.

129. *Id.* at 31.

130. *Id.* at 32, italics original.

131. *Id.*

132. *Id.*

133. *Id.* at 37.

134. *Id.*

135. *Id.*

136. *Id.* at 38.

137. *Id.*

138. *Id.* at 44.

139. *Id.*

140. *Id.*

141. *See* First Partial Award, *available at* http://www.naftaclaims.com (last visited Apr.12, 2003).

142. *Id.* at 22.

143. *Id.*

144. *Id.* at 58.

145. *Id.*

The issue regarding Article 1101 was whether the U.S. actions "related to" Methanex, because none of the measures were expressly directed at methanol, methanol producers, or Methanex.[146] The Tribunal concluded that "relating to" under Article 1101 of NAFTA signified something more than the effect of a measure on an investor or investment.[147] Instead, it required a legally significant connection between them, as argued by the U.S.[148]

Methanex's Original Statement of Claim did not meet the essential requirements of alleging facts with a legally significant connection between the U.S. measures, Methanex, and its investments.[149] Thus, as pleaded, the Tribunal held that it did not have jurisdiction over the Original Statement of Claim.[150]

As to the Amended Statement of Claim, the Tribunal did not consider the case clear enough to determine whether or not Methanex's allegations based on "intent" were sufficiently credible.[151] At that stage, it was not possible for the Tribunal to decide whether or not any measure did or did not relate to Methanex or its investments.[152]

In effect, the Tribunal required Methanex to re-plead its case in a new Statement of Claim.[153] The Original Claim failed the jurisdictional test under Article 1101 and potentially only a portion of the Amended Claim could survive that test as well.[154] Thus, in all fairness, the Tribunal required Methanex to make a fresh pleading.[155]

146. *Id.* at 59.

147. *Id.* at 70.

148. *Id.*

149. *Id.* at 73.

150. *Id.*

151. *Id.* at 76.

152. *Id.*

153. *Id.* at 77.

154. *Id.*

155. *Id.*

156. *Id.* at 49.

2. U.S. Challenges to Admissibility.

The U.S. challenges to admissibility were based on the legal submission that Methanex's claims were bound to fail because, even assuming all the alleged facts to be true, there could never be a breach of the individual provisions pleaded by Methanex.[156] However, the Tribunal held that it had no express or implied power to reject the claims based on inadmissibility.[157] Thus, the Tribunal rejected the U.S.'s admissiblity challenges generally.[158]

J. Methanex's Second Amended Statement of Claim

Methanex filed its second Amended Statement of Claim on November 5, 2002.[159] In the second amended claim, Methanex stated that it was suing over economic protectionism – it was not trying to expand international guarantees in a way that could threaten nations' or states' ability to enact valid environmental law.[160] Methanex claimed that California's unlawful protectionism is exactly the type of harm that Chapter 11 was meant to prevent.[161]

Methanex specifically challenged two measures adopted by California: (1) California Executive Order D-5-999; and (2) California Code of Regulations, title 13, § 2260 ("CaRFG3 Regulations").[162] The CaRFG3 Regulations provided that only ethanol could be used as an oxygenate in California's gasoline, effectively banning MTBE and methanol from competing with ethanol in the California oxygenate market.[163]

157. *Id.* at 57.

158. *Id.*

159. See Claimant Methanex Corporations' Second Amended Statement of Claim, Nov. 5, 2002, *available at* http://www.naftaclaims.com (last visted Apr. 12, 2003) [hereinafter Second Claim].

160. *Id.* at 4.

161. *Id.*

162. *Id.* at 7.

163. *Id.* at 8.

Methanex also provided an analysis of the law showing impermissible intent.[164] Methanex contended that U.S. measures were, on their face, intended to favor only domestic ethanol producers, which denied national treatment to ethanol's foreign competitors.[165]

Methanex then attempted to illustrate how the U.S. intentionally planned to shut out all foreign competitors of ethanol.[166] First, Methanex contended that California intended to harm foreign methanol producers, including Methanex.[167] Methanex alleged that California's measures were impermissibly protectionist, and on their face, were de jure discrimination.[168] Second, Methanex claimed that discriminatory intent can be inferred from the foreseen disparate impact California's measures would have on foreign investors and their investments.[169] Allegedly, that discriminatory intent was evident from the U.S.'s traditional protection of its domestic ethanol industry and from the fact that MTBE alone was banned, while other dangerous chemicals were not.[170]

Methanex further tried to show discriminatory intent from the role that ADM played in the ethanol industry.[171] Methanex contended that ADM secured its place in the ethanol market through political contributions and lobbying.[172] Finally, Methanex claimed that the harm to foreign competitors was foreseeable and probable, and that anti-foreign corporate bias against methanol and MTBE pervades national politics in the U.S.[173]

Methanex asserted that the California measures violated Articles 1102, 1105 and 1110 of NAFTA.[174] Specifically, it was alleged that the operative intent for purposes of Article 1102 must be discriminatory intent, or intent to deny national treatment, as opposed to intent to harm foreign investors or their investments.[175] Article 1102(3) governs Methanex's claim, which provides that investors and their investments in the territory of another Party will receive national treatment.[176] Furthermore, Article 1102 limits protection to the class of investors and investments who are in "like circumstances."[177] Methanex claimed that the critical test for "likeness" is competition.[178] Thus, Methanex asserted that it is in "like circumstances" with the protected domestic ethanol producers, but it had not received national treatment.[179]

With regard to Article 1105, Methanex contended that the California measures were intended to discriminate against foreign investors and their investmentss, which is, by definition, unfair and inequitable.[180] Thus, Article 1105 was breached because California did not give Methanex "fair and equitable treatment and full protection and security."[181] Furthermore, the United States' breach of Article 1102 "establishes a breach of Article 1105 as well."[182]

The final contention of Methanex stated that the California measures violated Article 1110. First, Methanex stated that a substantial portion of its investments were taken by facially discriminatory measures and given to the U.S. ethanol industry.[183] Second, the measures were a mechanism primarily intended to seize Methanex's share of the Cali-

164. *Id.*
165. *Id.* at 24.
166. *Id.* at 58.
167. *Id.*
168. *Id.* at 65.
169. *Id.* at 68.
170. *Id.* at 71, 77.
171. *Id.* at 82.
172. *Id.* at 83.
173. *Id.* at 109, 111.
174. *Id.* at 120, 128.
175. *Id.* at 121.
176. *Id.*
177. *Id.* at 122.
178. *Id.* at 123.
179. *Id.* at 125.
180. *Id.* at 128.
181. *Id.*
182. *Id.*
183. *Id.* at 129.

fornia oxygenate market.[184] Third, the discriminatory nature of the measures did not comply with "due process of law and Article 1105(1)."[185] Finally, Methanex was not compensated for the harm it received as a result of the California measures.[186]

Accordingly, Methanex claimed: (1) damages of $970 million as a result of the U.S. breach of Articles 1102, 1105 and 1110; (2) the cost of arbitration; and (3) applicable interest.[187]

K. United States' Supplemental Statement of Defense.

On March 21, 2003, the United States filed its supplemental statement of defense, addressing the issue of whether or not California intended to harm methanol producers when it issued the ban on MTBE.[188] The U.S. contended that there was no support for Methanex's claim that the MTBE ban was intended to harm methanol producers, specifically Methanex.[189] Instead, the U.S. asserted that the purpose of the ban was to addresss the problem of MTBE contamination of California's drinking water.[190] Moreover, for Methanex's claim to succeed, the U.S. claimed that a majority of the individual actors involved in adopting the measures would have to have been acting in bad faith.[191]

The United States asserted that, as demonstrated on the record, California harbors no ill will toward Methanex.[192] The United States contended that oxygenate producers do not face a real choice between methanol and ethanol because MTBE is sold only to gasoline refiners and ethanol is sold only to gasoline distributors.[193] Furthermore, ethanol and MTBE are produced using different processes, and thus, there is no "zero-sum" competititon between the two chemicals.[194]

Finally, the U.S. contended that the California measures at dispute do not "relate to" Methanex within the meaning of Article 1101(1) of NAFTA.[195] Thus, Methanex's claims fall outside the scope of the Tribunal's jurisdiction to hear the claims.[196]

The *Methanex* case is currently being arbitrated in Washington, D.C.[197]

III. Metalclad v. Mexico

In 1997, the U.S.-based Metalclad corporation filed for arbitration against Mexico under Chapter 11 of NAFTA.[198] The outcome of the case raised many issues about the potential consequences of NAFTA and about the powers of governments to pursue environmental policies that adversely affect foreign investors. At a fundamental level, the case calls into the question the basic powers that governments retain over their own territories.[199]

A. Background

In January 1993, Mexico's National Ecological Institute (INE) issued a federal permit to the Mexican firm Coterin for the construction of a hazardous waste landfill in the La Pedrera Valley, located in the state of San Luis Potosi.[200] In May 1993, San Luis Potosi

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 132.

188. *See* Supplemental Statement of Defense on Intent of Respondent United States of America, March 21, 2003, *available at* http://www.naftaclaims.com [hereinafter Supplemental Statement].

189. *Id.* at 11.

190. *Id.*

191. *Id.* at 13.

192. *Id.* at 17.

193. *Id.* at 21.

194. *Id.* at 21, 23.

195. *Id.* at 33.

196. *Id.*

197. For more information regarding the current status of the Methanex arbitration, go to http://www.nafta claims.com.

198. For more information on the NAFTA claim documents of Metalclad Corporation v. United Mexican States, go to http://www.naftaclaims.com (last visited Nov. 12, 2002).

199. 199 Mary Bottari, NAFTA's *Investor "Rights,"* MULTINATIONAL MONITOR, Apr. 1, 2001, *available at* 2001 WL 15520474.

200. Final Award, *supra* note 44, at 11.

granted Coterin a land use permit for the landfill, with the caveat that the permit did not authorize the facility's operation.[201] Metalclad then entered into an option agreement to acquire Coterin and its permits in order to construct and operate the facility.[202] Metalclad was advised by INE's president and the director-general of Mexico Secretariat of Urban Development and Ecology (SEDUE) that, except for a federal operating permit, all the required permits for the facility had been secured by Coterin.[203] In September 1993, Metalclad exercised its option to purchase Coterin.[204] Despite local opposition, Metalclad secured an 18-month extension of the INE construction permit and began construction of the landfill in May 1994.[205] In October 1994, the neighboring City of Guadalcazur ordered Metalclad to halt construction for failing to obtain a municipal construction permit.[206] Although Metalclad contended INE had assured that no such municipal permit was required, Metalclad proceeded to apply for a municipal construction permit to avoid conflict.[207] With the application in process, Metalclad received INE approval for completion and resumed landfill work.[208]

The landfill facility was approved and scheduled to open in March 1995.[209] Opening ceremonies, however, were blocked by demonstrators and with assistance from local state troopers, the landfill remained closed until November 1995.[210] In order to open without such opposition, Metalclad entered into a "Convenio" with INE and the Mexican Federal Attorney's Office for the Protection of the Environment (PROFEPA) requiring Metalclad to: 1) carry out remediation measures at the site; 2) designate an area of its land as a reserve for native species; 3) create a scientific advisory committee to monitor the remediation work; 4) provide a discount for locally generated hazardous waste; 5) contribute to local civic organizations; and 6) provide free medical services to the Guadalcazar community.[211]

Meanwhile, the Guadalcazar City Council denied Metalclad's request for a municipal construction permit, without giving Metalclad the opportunity to comment.[212] Guadalcazar then brought suit challenging the federal Convenio.[213] A preliminary injunction was granted and the action was finally dismissed.[214] While the action was pending, INE granted Metalclad another permit authorizing an expansion of the landfill despite the fact that the facility was dormant.[215]

In September 1997, the Governor of San Luis Potosi issued an Ecological Decree that established a protected natural area for a rare cactus.[216] The Natural Area included the landfill site, thereby preventing any future operation of the landfill.

B. Metalclad's Claims

Metalclad submitted its Notice of Arbitration on January 2, 1997.[217] Metalclad alleged that Mexico violated several parts of NAFTA Chapter 11, § A.[218] Metalclad also claimed that Mexico denied it "national treatment" and "most favored nation" treatment, and violated international law.[219]

201. *Id.* at 12.

202. *Id.* at 13.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 14.

207. *Id.*

208. *Id.*

209. *Id.* at 15.

210. *Id.*

211. *Id.* at 16-17.

212. *Id.* at 17.

213. *Id.* at 18.

214. *Id.*

215. *Id.*

216. *Id.* at 19.

217. Notice of Arbitration, *Metalclad Corp. v. United Mexican States*, *available at* http://www.naftaclaims.com (last visited Oct. 15, 2002).

218. Specifically, Metalclad claimed that Mexico had violated: Article 1102(1), (2) and (3); Article 1103; Article 1104; Article 1105; Article 1106(1)(f); Article 1110; and Article 1111.

219. Notice of Arbitration, *supra* note 217, at 4.

Metalclad contended that it had acted in good faith, detrimentally relied on the assurances of state and federal officials, and spent millions of dollars on tests, reports, studies, and analyses in order to satisfy Mexican officials.[220] The refusal by city officials to permit the opening and operating of the landfill directly and indirectly expropriated Metalclad's investment and enterprise.[221] Metalclad argued that this was an unlawful taking under Article 1110 of NAFTA.[222] The expropriation was not made on a non-discriminatory basis, and was not in accordance with due process of law and minimum standard of treatment requirements.[223] Metalclad sought $43,125,000 (US) in compensation plus damages for the value of its enterprise, which had not yet been fully determined.[224]

C. Mexico's Defenses

Mexico denied all claims, asserting that the Ecological Decree was outside the jurisdiction of the Tribunal because the Decree was enacted after Metalclad filed the Intent of Arbitration.[225] Furthermore, Mexico claimed that Article 1119 of NAFTA precluded claims for breaches that have not yet occurred.[226]

Mexico also relied on Article 1120 of NAFTA, which requires that six months pass between the events giving rise to a claim and the filing of the claim.[227] Mexico argued that a claim must be ripe at the time it is filed.[228] Mexico asserted (after adjusting its position from a former claim) that Section B of Chapter 11 does not consider the amendment of ripened claims to include post-claim events.[229]

220. *Id.* at 5.

221. Final Award, *supra* note 44, at 33.

222. Notice of Arbitration, *supra* note 217, at 6.

223. *Id.*

224. *Id.*

225. Final Award, *supra* note 44, at 19-20.

226. *Id.* at 20.

227. *Id.*

228. *Id.*

229. *Id.*

D. Metalclad's Chapter 11 Arbitration

On January 2, 1997, Metalclad demanded arbitration under Chapter 11 of NAFTA.[230] Metalclad claimed that Mexico was responsible under international law for its conduct and that San Luis Potosi and Guadalcazar had violated NAFTA §1105 (fair and equitable treatment of investments) and §1110 (which prohibits any party from expropriating investments – directly or indirectly – or taking any measure "tantamount" to expropriation, without compensation).[231] Mexico again denied all claims.[232]

Metalclad argued its case before a panel of three arbitrators at the International Centre for Settlement of Investment Disputes (ICSID).[233] The first session of the Tribunal was held in Washington D.C. on July 15, 1997, in which the Tribunal determined that Vancouver, British Columbia, Canada would be the arbitration site.[234]

D. The Metalclad Tribunal's Decision

The *Metalclad* Tribunal ultimately ruled for Metalclad and found Mexico in breach of Chapter 11.[235] Mexico was ordered to pay $16.7 million in compensatory damages to Metalclad.[236] This was the first suit brought under Chapter 11 of NAFTA in which the Tribunal ruled in favor of the Investor.[237]

1. Article 1105: Fair and Equitable Treatment

Under Article 1105, the Tribunal found that Metalclad was not treated fairly or equitably by Mexico. The Tribunal focused on whether a municipal permit for the construc-

230. Kass & McCarroll, *supra* note 43.

231. NAFTA, *supra* note 2, art. 1105, 1110.

232. Final Award, *supra* note 44, at 1.

233. *Id.* at 4.

234. *Id.* at 4-5.

235. *Id.* at 42.

236. *Id.*

237. Department of Foreign Affairs and International Trade, *supra* note 10.

tion of a hazardous waste landfill was required.[238] Metalclad believed that the federal and state permits it had already secured would allow for the operation and construction of the landfill and that the municipalities had not authority over hazardous waste matters.[239] Mexico responded that the municipality had a constitutional right to issue construction permits.[240]

The Tribunal found that the Mexican federal authority had controlling jurisdiction over hazardous waste evaluations and assessments, and that the municipality only had authority over particular construction considerations.[241] The municipality could only deny a permit for reasons relating to the physical construction or defects of the site and had improperly denied the permit on environmental impact grounds.[242]

2. Article 1110: Expropriation

The Tribunal also found that Mexico had indirectly expropriated Metalclad's investment without providing compensation.[243] Therefore, Mexico was in violation of Article 1110 of NAFTA.

According to the Tribunal, expropriation under Article 1110 includes open, deliberate, and acknowledged takings of property such as outright seizure, as well as covert or incidental interference with the use of property which deprives the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of the property.[244] The Tribunal found that by participating in the denial of the right to operate the landfill, Mexico must be held to have taken a measure tantamount to expropriation, which violates Article 1110 of NAFTA.[245]

According to the Tribunal, the Municipality exceeded its authority when it denied the construction permit based on the environmental effects of the hazardous waste landfill.[246] The denial of the permit combined with the representations of the Mexican federal government on which Metalclad relied, and the absence of a timely, substantive basis for the denial of the local construction permit, amounted to an indirect expropriation.[247]

The Tribunal identified other grounds for finding an expropriation in the Ecological Decree.[248] By declaring the area which included the landfill site an ecological preserve, the Decree effectively barred the operation of the landfill forever.[249] The Tribunal was not persuaded by Mexico's claims to the contrary, and the Tribunal did not need to consider the motivation or intent of the adoption of the Decree.[250]

3. The Tribunal Award

The Tribunal found that NAFTA was intended to promote cross-border investment opportunities.[251] According to the Tribunal, "transparency" was a key principle through which to accomplish that goal.[252] Transparency means that investors should have access to information concerning relevant legal requirements so that they can initiate and operate their investments.[253] If government authorities become aware of any basis for misunderstanding or confusion, it is their duty to make sure the correct position is immediately clarified.[254] Because Mexico failed

238. Final Award, *supra* note 44, at 27.

239. *Id.* at 28.

240. *Id.* at 28-29.

241. *Id.* at 33.

242. *Id.* at 29.

243. *Id.* at 36.

244. *Id.* at 33.

245. *Id.*

246. *Id.* at 34.

247. *Id.* at 34.

248. *Id.* at 35.

249. *Id.*

250. *Id.* at 36.

251. Michael Fitz-James, *Transparency for Investors? Not in this* NAFTA. *Canadian Court Gives* U.S. *Company Narrow Victory Over Mexico*, CORP. LEGAL TIMES, Aug. 2001.

252. *Id.*

253. *Id.*

254. *Id.*

to ensure a "transparent and predictable framework" for Metalclad's business planning, it undermined the company's expectation of fair and just treatment in accordance with NAFTA.[255]

The Tribunal ultimately awarded Metalclad $16,685,000.00, based on Metalclad's investment in the project, less the disallowance of expenses claimed for 1991 and 1992, less the amount allowed for remediation, plus the interest rate of 6% compounded annually.[256]

E. Justice Tysoe's Review of the Metalclad Tribunal's Decision

Mexico immediately appealed the Tribunal's decision.[257] Because the arbitration had taken place in Vancouver, B.C., the Supreme Court of British Columbia heard the appeal.[258] The Honorable Mr. Justice Tysoe presided over the case and held that the review of the Award would be governed by the provisions of the International Commercial Arbitration Act (CAA).[259]

1. Article 1105 – Minimum Standard

Mexico argued that the Tribunal committed two acts in excess of jurisdiction under Article 1105.[260] First, Mexico claimed that the Tribunal used the transparency provisions of NAFTA as a basis for finding a breach of Article 1105.[261] Second, Mexico claimed that the Tribunal went beyond the transparency provisions of NAFTA and created new transparency obligations.[262] As a result, the Tribunal improperly interpreted Mexican domestic law.[263] Furthermore, Mexico argued that the Tribunal wrongly found that Mexico had conceded during the arbitration that Metalclad was not required to exhaust local remedies before seeking arbitration under NAFTA.[264]

Justice Tysoe held that the Tribunal misstated the applicable law to include transparency obligations.[265] The principle of transparency is prevalent throughout Chapter 18, not Chapter 11 of NAFTA.[266] Justice Tysoe concluded that the Tribunal's finding on the transparency issue had exceeded the scope of the submission to arbitration.[267] Therefore, he stated that it was unnecessary to decide whether the Tribunal improperly made decisions of Mexican domestic law.[268]

2. Article 1110-Expropriation and Compensation

Mexican counsel argued that the Tribunal improperly considered the Ecological Decree in basing its decision under Article 1110.[269] Three main issues arose from this controversy:

1. Was the Tribunal correct in concluding that it could consider the Ecological Decree with respect to Article 1110?
2. Did the Tribunal decide a matter beyond the scope of its jurisdiction in concluding that the Ecological Decree constituted an act tantamount to expropriation?
3. Was it patently unreasonable for the Tribunal to conclude that the announcement of the Ecological Decree constituted an act tantamount to expropriation?[270]

Justice Tysoe concluded that no error resulted from the Tribunal considering the Ecological Decree.[271] The Court also held that notwithstanding the breach of Article 1105, the Tribunal's conclusion with respect to the

255. *Id.*

256. Final Award, *supra* note 44, at 42.

257. Todd Weiler, *Metalclad v. Mexico*: A *Play in Three Parts*, *available at* http://www.naftaclaims.com/Papers/JWI%20Article%20Final.pdf (last visited Apr. 12, 2003).

258. *Defense of Canadian Liberty Committee- Mexico v. Metalclad. Full Reasons for Judgment Tysoe*, May 22, 2001, *available at* http://www.canadianliberty.bc.ca/nafta/mexico_vs_metalclad.htm (last visited Oct. 15, 2002).

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

Ecological Decree stood on its own and was not based on a lack of transparency.[272] Finally, Tysoe did not believe that the Tribunal made a patently unreasonable error with respect to the Ecological Decree.[273]

3. Tysoe's Conclusion

In his conclusion, Justice Tysoe held that the award should be partially set aside.[274] Mexico succeeded in challenging the first two of the Tribunal's findings of breach of Articles 1105 and 1110, but it was not successful on the remaining points. The Court granted Metalclad 75% of its costs from that proceeding.[275]

F. The Aftermatch of Metaclad

The Metalclad arbitration illuminated two main principles for future NAFTA cases. First, the panel demonstrated that it would not shirk from interpreting the federal, state, and local laws of the parties involved.[276] The arbitrators interpreted the applicable Mexican laws and the extent to which the Mexican government could apply its own laws in its own territory without paying compensation to foreign investors. Second, the Tribunal's decision adopted an American perspective in its interpretation of state and local laws.[277] The Tribunal recognized private property rights that are protected under U.S. law but that are not recognized by either Canadian or Mexican law.[278]

Finally, the *Metalclad* arbitration was the first case brought under Chapter 11 in which a tribunal comprehensively explored the issue of damages.[279] In determining the Award, the Tribunal reasoned that the fair market value would be best determined by reference to Metalclad's actual investment in the project.[280] Furthermore, "where the state has acted contrary to its obligations, any Award to the claimant should, as far as is possible, wipe out all the consequences of the illegal act and re-establish the situation which would in all probability have existed if that act had not been committed."[281] The *Metalclad* Tribunal established guidelines for interpreting domestic law and determining compensation for future Chapter 11 disputes.

IV. Analysis of Article 1110–Environmental Regulation and the Effects of the Cases.

The goals of Chapter 11 of NAFTA are to establish a secure environment for investors by creating rules for fair treatment, removing barriers to investment, and providing an efficient way to resolve disputes between a the foreign investor and the host country. However, the potential for abuse of Article 1110 by private corporations may adversely affect domestic environmental regulation. Unforeseen problems have arisen and claims are being brought against the three countries by private investors.

The new, expansive definition of property rights under Chapter 11 unsettles many observers.[282] Private foreign companies can exploit NAFTA's ambiguity and force governments to pay for enacting environmental laws that cut into the companies' profits. If Methanex were to prevail, the U.S. government will effectively be forced to pay a Canadian company to stop producing a chemical that is contaminating California's drinking water. This scenario seems unfair to the citizens of California, who want to ensure their health and do not want their water contaminated by MTBE leaks. Furthermore, it seems even more unfair to other citizens of the United States who are unaffected by MTBE

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. Lucien J. Dhooge, *The North American Free Trade Agreement and the Environment: The Lessons of Metalclad Corporation v. United Mexican States*, 10 MINN. J. GLOBAL TRADE 209, 260 (2001).

277. *Id.* at 261.

278. *Id.*

279. *Id.* at 270.

280. Final Award, *supra* note 44, at 38.

281. *Id.* at 39.

282. Grieder, *supra* note 25.

leaks yet must pay for the award through their taxes.

Potential abuse by private corporations seeking governmental compensation may progress even further. The first governmental lawsuits against national governments started with claims such as that in *Ethyl Corporation*[283] in 1996.

In *Ethyl Corporation*, a Toronto lawyer named Barry Appleton sued Canada for its ban on the U.S. company's gasoline additive.[284] Appleton has since regularly sued the Canadian government and has delivered public alerts about the potential misuse of Chapter 11.[285] Appleton even suggested that Canadian hockey and baseball teams can sue the United States because American cities subsidize rival teams with taxpayer-financed stadiums.[286] This may seem far-fetched, but Appleton is correct that there have been few limits placed on Chapter 11 arbitration and that the potential for exploitation is immense.

National governments have also grown wary of potential exploitation of Chapter 11.[287] Mexico lost $16 million in the *Metalclad* case.[288] Mexico City has subsequently recognized that it may be a prime target for compensation and has assembled a team of lawyers to aggressively defend against every NAFTA claim filed against the city.[289] According to one of the lawyers on the team, if the team had not been formed, Mexico would have "become the insurer for every investment that goes awry in Mexico."[290]

A. The Environmental Effects of NAFTA Chapter 11

There are also many environmental effects of Chapter 11 that may not have been considered by the NAFTA co-signers. The treaty includes new corporate investment rights and protections unprecedented in scope and power.[291] Corporations that abuse these rights may file immense compensation claims that will subsequently discourage governments from passing environmental regulations that may adversely affect foreign investors. Sixteen suits have been filed with NAFTA tribunals thus far.[292]

Many environmentalists worry that NAFTA will permit foreign countries to successfully challenge U.S. domestic environmental laws and standards.[293] For example, in 1991 Mexico successfully challenged the U.S. Marine Mammal Protection Act (MMPA) as an illegal trade barrier under GATT.[294] The United States enacted the MMPA in part to prevent dolphins from being caught and killed in the nets of tuna fishers.[295] The MMPA banned the importation of tuna from Mexico because Mexico did not adequately regulate its fishing industry to prevent unnecessary harm to marine mammals.[296] However, Mexico succeeded in challenging the MMPA, and a GATT panel decided that the U.S. law was an illegal trade barrier under GATT.[297] Because Chapter 11 of NAFTA allows foreign governments and private companies to challenge domestic laws, it may have enormous implications on the security and autonomy of the governments of the NAFTA parties.

283. *Ethyl Corp. v. Canada*, *available at* http://www.naftaclaims.com (last visited Oct. 15, 2002).

284. Grieder, *supra* note 25.

285. *Id.*

286. *Id.*

287. Grieder, *supra* note 25.

288. Final Award, *supra* note 44, at 42.

289. Grieder, *supra* note 25.

290. *Id.*

291. Bottari, *supra* note 201.

292. Thomas D. Elias, *Canadian Firm Fights California Ban on Chemical* NAFTA *Invoked on Gasoline Additive*, The Wash. Times, Apr. 29, 2001, *available at* 2001 WL 4152173.

293. Glenn M. Stoddard, Case Note and Comment, *Implications of the North American Free Trade Agreement for U.S. Envtl. Law and Policy*, 13 WIS. INT'L L.J. 317, 320 (1994).

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

Chapter 11 may have other major impacts on environmental law within NAFTA countries. Foreign investors are using Chapter 11 as a strategic offensive threat against governments which may render decisions that may adversely affect their companies.[298] This activity may constrict environmental regulation and have a severe chilling effect on any future proposals for environmental protection.[299] The fallout from *Metalclad* and *Methanex* illustrate the potential consequences of this abuse of NAFTA by private corporations and investors.

B. The Environmental Effects of *Metalclad*

The *Metalclad* case has caused concern among environmentalists because of the Panel's apparent downgrading of "environmental concerns" that conflict with a private investor's expectations.[300] Critics of the case point out that the Panel failed to acknowledge that another important goal of NAFTA is regional environmental protection.[301] By focusing solely on the expropriation aspect of Metalclad's claim, the Panel failed to balance competing goals of NAFTA. Furthermore, it is important to note that the Panel took it upon itself to decide questions regarding Mexican environmental law, specifically, the ability of municipalities to regulate waste facilities.[302]

Hugo Perezcano, Mexico's leading lawyer in the *Metalclad* arbitration, wondered how the Ecological Decree could have ever amounted to a remediable expropriation under NAFTA's Chapter 11.[303] "This decision means when an ecological decree affects the property rights of foreign investors, even if it's lawful under our domestic law, then it should be regarded as a compensable taking."[304] Perezcano further stated that there was no evidence that the decree had any impact in affecting Metalclad's business, and the decision of the NAFTA tribunal amounted to the usurpation of Mexican decision-making.[305]

The Tribunal's decision provides further evidence that NAFTA and the environment may be at odds. Michelle Swenarchuk of the Canadian Environmental Law Association stated, "NAFTA is saying, you can have your local rules for dumping, but if a foreign company wants to dump . . . it can force you to pay."[306] Municipalities may have a tough time turning away garbage in the future if foreign corporations are involved.[307] "This case is a terrible example of how necessary environmental controls can become near impossible for local communities," said Swenarchuk.[308]

As a result of *Metalclad*, the Mexican government may choose to use NAFTA as a rationale for restricting the autonomy of local governments.[309] According to Gerard Greenfield,[310] "federal governments are often willing to lose these cases in order to discipline provincial, state, or municipal governments which have adopted progressive social and environmental policies."[311] If the Mexican government does in fact want to control what local authorities and states are doing and disregard local environmental laws altogether, this may be an effective means for them to go about it. This could have a devastating effect on Mexican environmental policy as a whole and undermine any regional envi-

298. Mann, *supra* note 13 at 405

299. Dhooge, *supra* note 19, at 542.

300. Kass & McCarroll, *supra* note 43.

301. *Id.*

302. *Id.*

303. Fitz-James, *supra* note 253.

304. *Id.*

305. *Id.*

306. John Newcomb, NAFTA *Ruling Raises Environmental Questions*, GLOBE AND MAIL (Toronto), Sept. 1, 2000, *available at* http://csf.colorado.edu/mail/elan/2000/msg00871.html (last visited Oct. 15, 2002).

307. *Id.*

308. *Id.*

309. Investment and Trade, *available at* http://www.mob4glob.ca/invest.html (last visited Oct. 15, 2002).

310. Gerard Greenfield is a labor research activist who has worked with unions and grassroots workers' organizations in Asia. He has worked for the International Union of Food Workers (IUF) on workers' education, and for the past five years, has been based in Hong Kong.

311. Investment and Trade, *supra* note 309.

ronmental protection that localities want to enforce.

Mexico has fairly strong environmental protection legislation, but its enforcement of this legislation has been weak.[312] Mexico's environmental law is now enforced by the Social Development Secretariat (SEDESOL), which replaced the former Urban Development and Ecology Secretariat (SEDUE) in 1992.[313] Both agencies have been criticized for failing to enforce Mexico's environmental laws.[314] Abuse of Chapter 11 by private corporations may create more conflict within a nation already plagued with problems such as torture, human rights abuses, de facto one party rule and an undemocratic electoral system.[315] Thus, exploitative NAFTA claims against Mexico may do more than merely hinder future environmental protection in Mexico, they may prevent it entirely.

C. The Environmental Effects of *Methanex*

Even before any final decisions are rendered, the *Methanex* case has significant implications.[316] Methanex's claims alone may hinder future environmental regulation.[317] First, Methanex attempted to expand the definition of "expropriation" in ways that were arguably never anticipated by the signers of NAFTA.[318] If the definition of expropriation were construed too broadly, private investors may have greater opportunity to exploit Article 1110 and bring more suits against the NAFTA parties.

Second, some see Methanex's claims as an attempt to use NAFTA to rewrite the Executive Order after the company failed in its campaign against the measure.[319] Although Governor Davis issued the Executive Order to reduce the contamination of California's drinking water, the government may have to pay dearly for its efforts. If Methanex succeeds in arbitration, California will be under pressure to rescind its Executive Order in an attempt to lessen the damage award.[320] The *Methanex* case is "a clear threat to California state sovereignty and democratic governance," said Martin Wagner of the Earthjustice Legal Defense Fund.[321]

California legislators fear that if Methanex succeeds, states will no longer be able to regulate their own environments.[322] Instead, states may have to sacrifice some of their sovereignty and defer to the federal government. In *Metalclad*, the Panel interpreted the Mexican constitution and prevented local authorities from exercising autonomy in regulating their local environments. The Panel's approach could have devastating effects on California's environment if the state must adhere to federal standards rather than its own more stringent environmental regulations.[323] Many California regulations, including smog control, are tougher than federal standards.[324] Lori Wallach, director of the Global Trade Watch wing of the Public Citizen consumer advocacy group, stated that "[t]he *Methanex* action is an unconscionable corporate Canadian shakedown of California's clean water standards."[325]

This type of jurisdictional manipulation may grant a dangerous privilege to industry in public policy-making processes.[326] Foreign investors could threaten damages awards over host governments under Chapter 11 pretenses, which may affect crucial stages of the public policy process involved in making environmental regulation.[327] There are millions of constituents, either individuals or corporations, located within the boundaries of the

312. Stoddard, *supra* note 293, at 334.
313. *Id.* at 335.
314. *Id.*
315. *Id.*
316. Dhooge, *supra* note 19, at 541.
317. *Id.*
318. *Id.* at 544.
319. *Id.* at 545.
320. Bottari, *supra* note 199.
321. *Id.*
322. Elias, *supra* note 292.
323. Elias, *supra* note 292.
324. *Id.*
325. *Id.*
326. Dhooge, *supra* note 19, at 545.
327. *Id.*

NAFTA countries.[328] The potential abuse of Article 1110 may become overwhelming if governments face lawsuits by any private individual adversely affected by governmental regulation. Threats of suing for damages by these private investors may significantly interfere with state sovereignty and environmental regulation, and the consequences of this loss of governmental control over environmental matters may prove to be disastrous in the future.

Furthermore, private corporations may undermine environmental regulation by demanding compensation before they stop polluting. The investor-state provisions of Chapter 11 essentially transfer ownership of the environment to the polluters by requiring the public to pay for the right to regulate the environment.[329] Martin Wagner from Earthjustice described the cases as "tantamount to extortion."[330] In *Methanex*, the corporation essentially claimed that the government must pay Methanex in order to stop it from producing a potentially dangerous chemical.[331] "This is even more appalling when you consider that the victims of this extortion are the people of California who don't want their drinking water contaminated by MTBE," said Wagner.[332]

Methanex is comparable to *Ethyl Corporation v. Canada*, the first case brought under Chapter 11[333] and another example of how foreign corporations may influence domestic environmental regulation. Ethyl Corporation, a U.S. corporation, succeeded in forcing Canada to repeal its ban on MMT, a gasoline additive.[334] Ethyl Corporation brought suit against Canada for its ban on the gasoline additive, and after the settlement process, Canada had no other choice but to repeal the ban and to continue to use a chemical that it no longer wanted in its unleaded gasoline.[335]

Applying this reasoning to *Methanex*, if Methanex prevails in the Tribunal, it may succeed in forcing California to repeal its ban on MTBE in order to lessen the damages award. The U.S. Senate recently decided to triple the ethanol used in gasoline and impose a national ban on MTBE.[336] If the U.S. is forced to pay a large award to Methanex, this may affect the national ban on MTBE, demonstrating one of the many dangers of Article 1110 – the influence foreign corporations may have over environmental regulation.

V. The Provisions of Article 1110 Give Foreign Corporations an Unfair Advantage Over Domestic Corporations.

Chapter 11 of NAFTA creates an unfair advantage for foreign investors over domestic competitors.[337] Under Chapter 11, foreign companies may take a number of measures against the host government that domestic companies, who are not protected by Chapter 11, cannot.[338] Domestic investors do not have equivalent rights to foreign investors, who may seek damages from a host state for activities that adversely affect the foreign investors' interests.[339] Although a solution may be to provide the same kind of compensation to domestic investors, the result could be disastrous and could require the payment of

328. *Id.*

329. Dhooge, *supra* note 278, at 280.

330. Bottari, *supra* note 199.

331. *Id.*

332. *Id.*

333. *Id.*

334. Ethyl Corporation is a U.S. company that produces MMT, a fuel additive used in Canada to provide octane enhancement in unleaded gasoline. In 1997, Canada passed the MMT Act, which prohibited the import and trade of MMT into the country. Canada was not worried about the health concern of MMT itself, but rather, with the manganese oxides produced upon combustion of the additive. The Health Canada Report concluded that MMT, as well as the oxides produced from its combustion, are not a threat to the environment. Ethyl Corporation brought a claim against Canada and a settlement for $13 million was reached. The Canadian ban was eventually reversed. For more information go to Statement of Claim, *Ethyl Corporation v. Canada*, *available at* http://www.naftaclaims.com (last visited Oct. 15, 2002).

335. *Id.*

336. MTBE *Plan Stirs Fears of Risk to State's Gas*, S.F. CHRON., Mar. 9, 2002, at A3.

337. Dhooge, *supra* note 19, at 547.

338. *Id.*

339. *Id.*

hundreds of millions of dollars in compensation.[340] Instead, domestic investors may decide to go to other countries because they receive greater protection for their investments under NAFTA than they would under domestic laws.

For example, if Methanex were to prevail in its claims, neither the U.S. government nor California will be obligated to compensate domestic manufacturers of methanol.[341] Domestic manufacturers of methanol such as Terra Industries, Inc.,[342] will have no legal recourse for their loss of business from California.[343] The United States does not have an expanded definition of "expropriation," and its own takings doctrine compensates owners only for their loss in land, not for their loss in investments. Without alternatives for compensation, domestic companies must simply absorb such losses. Thus, if Methanex were to receive compensation for its losses due to the MBTE ban, it gains an advantage over U.S.-based methanol-producing companies such as Terra Industries, who are provided no such remedy.

VI. Conclusion.

Although NAFTA was drafted and ratified with the best intentions, Article 1110 provides private companies with a major loophole. Abuse of Article 1110 may have dire consequences on the future of environmental regulation for Mexico, Canada, and the United States. Allowing private corporations whose investments are negatively affected by environmental laws to sue national governments may make countries more reluctant to pass environmental laws. Foreign corporations are given an unfair advantage over domestic corporations because the foreign corporations can seek compensation for takings while domestic corporations must absorb such losses. Finally, it appears that NAFTA arbitration tribunals are expanding the definition of expropriation. Broadened too far, NAFTA's definition of expropriation may be exploited by corporations and hinder not only environmental regulation, but also the stability of basic governmental functions and national economic welfare.

The future of environmental regulation will be greatly influenced by the arbitrations filed under Article 1110. As more cases are litigated, the parameters of Article 1110 will be more clearly defined and its limits set. Hopefully, a balance can be struck between protecting investor rights in foreign countries and the rights of governments to regulate the environment and protect public health.

340. *Id.* at 548.

341. *Id.*

342. Terra Industries is one of the leading U.S. producers and marketers of methanol. For more information, go to Terra Industries, *available at* http://www.terraindustries.com (last visited Oct. 15, 2002).

343. Dhooge, *supra* note 19, at 547-48.